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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 339

AVONDALE MARINE WAYS, INC.,

versus

SADIE ANTHONY WILSON, INDIVIDUALLY, SADIE ANTHONY WILSON, TUTRIX OF THE MINORS GOVERNOR THOMAS, EDDIE JUNIUS THOMAS, VAINEY THOMAS and ANNA ANTHONY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUBJECT INDEX

	PAGE
CITATIONS	II
Statutes	II
Table of Cases	II
PETITION	1
SUMMARY STATEMENT	2
THE DECISIONS BELOW	5
STATUTES INVOLVED	5
JURISDICTION	7
THE QUESTIONS PRESENTED	7
REASONS RELIED ON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI	8
SPECIFICATION OF ERRORS	10
ARGUMENT	11
CONCLUSION	21
CERTIFICATE	22

CITATIONS

1. Statutes

Constitution of the United States, Article I, Sec. 8	8, 11
Constitution of the United States, Article III, Sec. 2	7, 8
Constitution of the United States, Article VI	8
Constitution of the United States, Fifth and Fourteenth Amendments	8
Act June 5, 1948, 62 Stat. 928, 28 U. S. Code 1254	7
Longshoremen's and Harbor Workers Compensation Act, 44 Stat. 1426, 33 U.S.C. Sec. 901, et seq.	2
Sec. 902(14)	5, 6
Sec. 909	5
Sec. 921	3, 7
Louisiana Civil Code of 1870, Articles 184, 191, 192	6

CITATIONS—(Continued)

2. Table of Cases

	PAGE
Bolin vs. Marshall, 76 F. 2d 668	18
Davis vs. Department of Labor & Industries, 317 U. S. 249	12
Ellis vs. Henderson, 204 F. 2d 178	2, 5
Green vs. Crowell, 69 F. 2d 762	18
Heiner vs. Donnan, 285 U. S. 312	16
Poff vs. Pennsylvania R. Co., 327 U. S. 399	18
Prudence Realization Corp. vs. Geist, 316 U. S. 89, 95	20
Robbins Dry Dock Co. vs. Dahl, 266 U. S. 449	12, 13
Sanderson vs. Sause Bros., 1953 AMC 1261	21
Schlessinger vs. Wisconsin, 270 U. S. 230, 240	9, 16
Southern Pacific Co. vs. Jensen, 244 U. S. 205, 214-5	11
Southern Railway vs. Gray, 241 U. S. 333, 338-9	20
United States vs. Provident Trust Co., 291 U. S. 272, 285-6	18
Weyerhauser Timber Co. vs. Marshall, 102 F. 2d 78, 81	9

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the United States:

Avondale Marine Ways, Inc., the employer of Mose Wilson, deceased, prays that a writ of certiorari issue out of this Court to review a decision of the Court of Appeals for the 5th Circuit in so far as it holds that petitioner

must pay compensation under the Longshoremen's and Harborworkers' Compensation Act, 44 Stat. 1426, 33 U. S. C. §§ 901 et seq., for the benefit of four minor illegitimate children of the decedent's estranged widow.

SUMMARY STATEMENT.

The case presents a novel question under the Longshoremen's and Harborworkers' Compensation Act (herein called the Longshoremen's Act) which has not been, but should be, decided by this Court. It involves the interpretation of the words "child or children of the deceased" in Section 9 of that Act, 33 U. S. C. § 909. It is a companion case to *Ellis v. Henderson*, 204 F. 2d 178, decided by the same court on the same day, and in which an application for a writ of certiorari has been filed in this Court, Docket No. 310.

A claim for compensation growing out of the death of petitioner's employee, Mose Wilson, was filed by his estranged widow, Sadie Anthony Wilson, in her own behalf and in behalf of her children. The employee's death occurred in an explosion on a barge which was afloat on the Mississippi River near New Orleans.

The widow and the deceased employee were married on November 25, 1927 (R. 5, 20, 23) and separated in July 1928 (R. 5, 20, 23). In 1934, while she was residing with one Savoy Harrell she had a child whose birth was registered under the name Governor Charles Junius Harrell, son of "Savall Harrell" (R. 7, 24). From 1942 on

she lived with one Harry Thomas during which time she gave birth to the other three children involved in this litigation, namely, Eddie Junius Thomas, born June 4, 1945, Vainey Thomas, born September 6, 1946, and Anna Anthony, born October 8, 1948 (R. 8, 24). The two boys were registered with the name Thomas, and the official birth records showed their father as Harry Thomas, the man with whom the widow was living (R. 8, 25). The girl, Anna, was born in a hospital and someone there informed the mother that she could not be given the name of her actual father, Thomas, and consequently she was named Anna Anthony (R. 8).

The record shows, and the District Court found, that the four minor children in question were not "children of the deceased," but of other men with whom the widow was living illicitly after her separation from the deceased.

The Deputy Commissioner made an award to the widow individually and on behalf of her four minor children (R. 10), and a complaint for an injunction (R. 1) was filed by the petitioner in the United States District Court for the Eastern District of Louisiana under Section 21(b) of the Longshoremen's Act, 33 U. S. C. 921(b). The District Court granted a preliminary injunction (R. 14), and later a final injunction (R. 19), against the award in favor of the widow individually and in behalf of her minor children. The United States Attorney for the Eastern District of Louisiana filed a notice of appeal from the District Court decision (R. 29), but later withdrew from the case (R. 31), and the widow was granted leave in her own behalf and in behalf of her minor

children to continue the prosecution of the appeal (R. 31).

The Court of Appeals affirmed the decision of the District Court that the widow could not recover compensation for herself, but reversed the District Court as to her four illegitimate children and held in their favor on the ground that under the law of Louisiana they were conclusively presumed to be the children of her husband, petitioner's deceased employee, regardless of the true facts.

The widow's original application for compensation for herself and her minor children asked compensation also for a son of the deceased Willie Wilson who was over eighteen years of age. The Deputy Commissioner denied compensation for that child and that part of the claim is no longer an issue.

The sole issue presented is whether the words "child or children of the deceased" in Section 9 of the Longshoremen's Act include illegitimate children of his wife who were born to other men long after the mother was separated from the deceased, who never were acknowledged by the deceased, to whom the deceased did not stand *in loco parentis*, and who had never been dependent upon the deceased. The Court of Appeals held that, even though they might not have been the deceased's children in fact, they were conclusively presumed under Louisiana law to be the children of Mose Wilson and therefore entitled to compensation under the federal statute.

THE DECISIONS BELOW.

The Deputy Commissioner's compensation order and award is printed at pages 4-11 of the record. The District Court decision has not been officially printed but is contained in its findings of fact and conclusions of law (R. 19-28). The Court of Appeals decision (R. 34) is reported in 204 F. 2d 178. In that opinion the court referred to, and followed, its decision in *Ellis v. Henderson*, 204 F. 2d 173.

STATUTES INVOLVED.

This case involves the Longshoremen's Act, 33 U. S. C. §§ 902 (14) and 909, the pertinent parts of which are as follows:

§909:

> "If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
>
> * * * * * * * *
>
> "(b) * * * * if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each such child; * * *
>
> "(c) If there be one surviving child of the deceased, but no surviving wife or dependent husband, then for the support of such child 35 per centum of the wages of the deceased; and if there be more than

one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 35 per centum of such wages * * * *."

§902(14):

"Child shall include a posthumous child; a child legally adopted prior to the injury of the employee; a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of the injury, and a stepchild or acknowledge illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him . . .".

The court below also applied Articles 184, 191, and 192 of the Louisiana Civil Code of 1870 which provide as follows:

"Art. 184. The law considers the husband of the mother as the father of all children conceived during the marriage."

"Art. 191. In all cases above enumerated, where the presumption of paternity ceases, the father, if he intends to dispute the legitimacy of the child, must do it within one month, if he be in the place where the child is born, or within two months after his return, if he be absent at that time, or within two months after the discovery of the fraud, if the birth of the child was concealed from him, or he shall be barred from making any objection to the legitimacy of such child."

"Art. 192. If the husband die without having made such objection, but before the expiration of

the time directed by law, two months shall be granted to his heirs to contest the legitimacy of the child, to be counted from the time when the said child has taken possession of the estate of the husband, or when the heirs shall have been disturbed by the child, in their possession thereof."

JURISDICTION.

This is a proceeding under 33 U. S. C. § 921, with jurisdiction granted by said statute and by Article III, § 2, of the Constitution of the United States.

The opinion of the Court of Appeals for the 5th Circuit was rendered on May 1, 1953, and a subsequent petition for re-hearing was denied by that court on June 26, 1953 (R. 40).

The jurisdiction of this Court to review this case on certiorari is conferred by 28 U. S. C. § 1254.

THE QUESTIONS PRESENTED.

This petition presents only questions of law as to the effect of state laws on a federal statute enacted under the constitutional grant to Congress of power to fix and determine the maritime law; specifically, whether a law providing a conclusive presumption of legitimacy, contrary to the fact, can enlarge the classes of beneficiaries under the Longshoremen's Act with the result that in

some states there would be a greater liability of an employer than in other states under the same identical federal maritime statute.

Such questions necessarily involve the constitutionality of the state statutes, when applied to the Longshoremen's Act, under the due process clauses (Fifth and Fourteenth Amendments), the admiralty and maritime clauses (Article I, § 8, and Article III, § 2), and the supreme law of the land provision (Article VI).

REASONS RELIED ON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

1. The decision below subordinates the Longshoremen's and Harborworkers' Act to the Louisiana State law notwithstanding the rights and liabilities under the Longshoremen's Act were provided by Congress under its paramount and exclusive jurisdiction of maritime matters. The Longshoremen's Act does not provide any conclusive presumptions, but the decision below allowed a conclusive presumption of a fact, contrary to the true fact, because of a Louisiana statute rather than anything in the Longshoremen's Act itself.

The Longshoremen's Act is a law of the United States made pursuant to the Constitution and is part of the "supreme Law of the Land," under Article VI of the Constitution of the United States.

2. The Louisiana statutory conclusive presumption is unconstitutional, when applied to the Longshoremen's Act, in taking property without due process of law, under the Fourteenth Amendment. "The State is forbidden to deny due process of the laws for any purpose whatsoever." *Schlessinger v. Wisconsin,* 270 U. S. 230, 240.

3. The decision below is in conflict with the decision of the Court of Appeals for the 9th Circuit in *Weyerhauser Timber Co. v. Marshall,* 102 F. 2d 78, 81, which held that a Washington state statute requiring the acknowledgement of an illegitimate child to be in writing had no effect under the Longshoremen's Act, saying:

> "Congress having provided all definitions necessary to the determination of whether claimant is a 'child' and its authority being paramount and exclusive as to the subjects on which it has legislated, it is not allowable to go beyond the Act provisions."

4. The decision below imposes on petitioner a liability not authorized by the paramount law of the land, the Longshoremen's Act.

5. The decision below gives an illegitimate child greater rights than legitimate issue of the deceased employee in that, under that decision, the illegitimate child can recover for the death of his mother's husband and also for the death of his own father.

6. The court below decided an important question of federal law which has not been, but should be, settled by this Court.

SPECIFICATION OF ERRORS.

The Court of Appeals erred in the following respects:

1. In holding that rights and liabilities under the Longshoremen's Act are governed by state law.

2. In misconstruing the express language of the Longshoremen's Act and holding that it left the interpretation of the words "child or children of the deceased" to the laws of forty-eight different states.

3. In holding that, although the Longshoremen's Act "makes it clear that 'child,' without more, means a 'legitimate child'," the Louisiana law makes it also mean, in that state, an unacknowledged illegitimate child of the deceased's estranged wife.

4. In holding that, although the Longshoremen's Act provides compensation only for "children of the deceased" and those legally adopted by, or acknowledged and dependent on, the deceased, or those to whom the deceased stood *in loco parentis,* the Louisiana statutes extended it, by the creation of a conclusive presumption, to illegitimate children of his wife not acknowledged, but denied, by him.

5. In holding that, under the Longshoremen's Act, an employee in Louisiana makes a child his own by failing to disavow its paternity within a stated period, regardless of the child's true paternity.

6. In disregarding the explicit provisions of the Longshoremen's Act, and sanctioning the taking of property without due process of law.

7. In reversing the District Court's holding that the widow's illegitimate children, unacknowledged by the deceased, were entitled to benefits under the Longshoremen's Act.

ARGUMENT.

The Longshormen's Act was passed by Congress under its Constitutional power in matters of admiralty and maritime jurisdiction. As this Court said in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 214-5:

> "Article III, § 2, of the Constitution, extends the judicial power of the United States 'To all cases of admiralty and maritime jurisdiction;' and Article I, § 8, confers upon the Congress power 'To make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.' Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has a paramount power to fix and determine the maritime law which shall prevail throughout the country."

And in holding that a state compensation statute was unconstitutional as applied to an accident on navigable water, it said on page 216:

> "And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself."

In *Davis v. Department of Labor and Industries*, 317 U. S. 249, this Court pointed out the purpose and scope of the Longshoremen's Act.

There is no question in the case at bar as to the maritime nature of the accident involved. It is an established and admitted fact that the accident occurred on a completed barge afloat in a navigable river.

In *Robbins Dry Dock Co. v. Dahl*, 266 U. S. 449, the lower courts had allowed a jury in a state court civil action to consider a New York statute in determining whether defendant was negligent in a case involving a marine tort. This Court reversed saying, at page 457:

> "The alleged tort was maritime, suffered by one doing repair work on board a completed vessel. * * *. The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute

(citing cases). They would not have been different if the accident had occurred at San Francisco."

It would seem clear that no state could enlarge, or limit, the coverage of the Longshoremen's Act. Certainly a state statute could not extend that federal statute to provide benefits to or for a decedent's gardner. We submit that a state statute attempting to make a child born to another than the decedent a "child of the deceased" under the Longshoremen's Act, likewise could not enlarge the beneficiaries fixed by Congress. In *Weyerhaeuser Timber Co. v. Marshall,* 102 F. 2d 78, the Circuit Court of Appeals for the 9th Circuit held that a state statute involved in that case could not reduce the beneficiaries provided for in the Longshoremen's Act. If a state can not limit or lessen the beneficiaries under the Longshoremen's Act, there is no logical reason why it could enlarge them.

We agree with the statement in the opinion of the court below (204 F. 2d. page 174) that "the language of this Act makes it clear that 'child,' without more, means a 'legitimate child'." That would seem self evident, when qualified, as in the Longshoremen's Act, by the words "of the deceased." This maritime statute could not legally "be enlarged or impaired by" a state statute (*Robbins Dry Dock Co. v. Dahl, supra,* 266 U. S. at page 457).

The only child to benefit under the Longshoremen's Act is a "child of the deceased" or "a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood

in loco parentis for at least one year prior to the time of injury, and a step-child or acknowledged illegitimate child dependent upon the deceased." Section 2(14). By including adopted, acknowledged, etc. children, Congress clearly and definitely disclosed its intention to provide only for those who were issue of the deceased or held out by him to occupy a similar relationship to him. Such additional children are almost universally treated the same as lawful issue. The Act does not, and Congress did not intend to, provide that in addition to those enumerated in the Act the beneficiaries would also include any minors specified by any state statute, whether by presumption or substantive law. Its provision for what children would benefit, besides true natural children of the deceased, necessarily excludes others.

Section 2(14) of the Act provides that "child" *includes* those specified in it, not that "child" *means* those others. Wherever the word appears in Section 9 it is "child of the deceased." If only Section 2(14) were considered it might exclude lawful issue of the deceased.

It is inconceivable that Congress could have meant that "child of the deceased" would include, not only those specified in Section 2(14), but any other minors that any state might add. A state law providing that a child of the deceased's wife's cousin would be considered, or presumed to be, a "child of the deceased," certainly would not create a liability of the employer to such child under the Longshoremen's Act. Nevertheless such child would be as nearly related to the deceased as an illegitimate child of his estranged widow. The District Court found:

> "(3) Subsequently, Sadie Anthony Wilson lived with Savoy Harrell in Clinton, Louisiana, and bore

him two children whose births she registered under the names Governor Harrell and Mattie Harrell, and named Savoy Harrell as their father.

"(4) Sadie Anthony Wilson then lived in concubinage with Harry Thomas from 1942 through the time of the hearing before the Deputy Commissioner on April 22, 1952, and bore him several children, including the minors Eddie Junius Thomas, Vainey Thomas, and Anna Anthony.

"(5) Deceased employee, Mose Wilson, was not the father in fact of the four children in question, namely Governor Harrell Thomas, Eddie Junius Thomas, Vainey Thomas, and Anna Anthony." (R. 26, 27.)

It then held:

"(3) The minors, * * * not being the children of the deceased employee, Mose Wilson, are not entitled to recover under Section 2(14) of the Act, 33 U. S. Code 902 (14)."

"(6) The minor children not being the children in fact of the decedent but children of other men, the presumption of paternity set forth in Article 184 of the Louisiana Civil Code of 1870, can have no effect as to Avondale Marine Ways, Inc." (R. 27, 28.)

The decision of the District Court was reversed on the ground that, notwithstanding such facts, the Louisiana statutory conclusive presumption required the petitioner (employer) to pay compensation for the illegitimate unacknowledged children of the decedent's widow. The Court of Appeals said (204 F. 2d at page 175):

"A *fortiori*, what is termed a 'conclusive presumption', in most instances is actually a rule of substan-

tive law. (Citing authorities.) A conclusive presumption as a rule of evidence without logic or basis might be constitutionally invalid, but if the rule of substantive law would be constitutional, the form of the words used in stating the rule is immaterial."

It then proceeded to treat the purported "conclusive presumption" of the Louisiana Code as a rule of substantive law applicable to the Longshoremen's Act.

In *Schlessinger v. Wisconsin,* 270 U. S. 230, there was involved a state statute providing that a transfer of property within six years prior to the death of the grantor would be considered to have been made in contemplation of death. This Court held the statute unconstitutional under the Fourteenth Amendment, saying:

> "Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever." Page 240.

Heiner v. Donnan, 285 U. S. 312, involved the Revenue Act of 1926 which imposed a federal estate tax and provided that transfers within two years prior to death would be "deemed and held to have been made in contemplation of death." In holding the two year provision unconstitutional under the Fifth Amendment, this Court said:

> "But the presumption here created is not of that kind. It is made definitely conclusive,—incapable of being overcome by proof of the most positive character. Thus stated, the first question submitted is answered in the affirmative by Schlessinger v. Wis-

consin, * * *. The only difference between the present case and the Schlessinger Case is that there the statute fixed a period of six years as limiting the application of the presumption, while here it is fixed at two; and there the Fourteenth Amendment was involved, while here it is the Fifth Amendment. * * *. The presumption was held invalid upon the ground that the statute made it conclusive without regard to actualities, * * *.

"The Schlessinger Case has since been applied many times by the lower federal courts, by the Board of Tax Appeals, and by state courts; and none of them seem to have been at any loss to understand the basis of the decision, namely, that a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment.

"Nor is it material that the Fourteenth Amendment was involved in the Schlessinger Case, instead of the Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same." Pages 324-6.

"The government makes the point that the conclusive presumption created by the statute is a rule of substantive law, and, regarded as such, should be upheld; * * *.

"If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law." Pages 328-9.

We submit that the intent of Congress was to enact its own law within the maritime jurisdiction, which, like the general maritime law, would be reasonably uniform throughout the country. As this Court said in *United States v. Provident Trust Co.*, 291 U. S. 272, 285-6:

> "* * * * we well may assume that Congress could not have meant to leave its aim to be diverted by a purely arbitrary presumption, which, whether applicable or not to *sustain* another or different policy, would deny the truth and *subvert* the policy of this particular legislation."

The rights and liabilities of the parties under this federal statute should not be any different in Louisiana than "if the accident had occurred in San Francisco" *Robbins Dry Dock Co. v. Dahl, supra,* 266 U. S. at page 457. It is not a case of determining "next of kin" *Poff v. Pennsylvania R. Co.*, 327 U. S. 399, or who is a "surviving wife" *Green v. Crowell,* 69 F. 2d 762; *Bolin v. Marshall,* 76 F. 2d 668. Naturally, unspecified next of kin are those recognized as such where the decedent lived; and a surviving wife is a survivor of a marriage recognized in the state where contracted. A "child of the deceased" does not mean a child of someone other than the deceased, as that would "deny the truth and subvert the policy of" this Act of Congress, *United States v. Provident Trust Co., supra,* 291 U. S. at pages 285-6. The fact that Congress specified what children would be beneficiaries other than the legitimate offspring of the deceased (Section 2), does not indicate an intention to include still others, but shows the contrary. The language discloses an intent that only those minors to whom the deceased had stood *in loco*

parentis by having put himself in that position would be included as beneficiaries.

The children in this case were all born to other men and their true father stood *in loco parentis* to them. If their true father should die in an industrial accident within the Longshoremen's Act, they could recover compensation benefits. Under the decision below they could recover for two deaths, a result that would give greater benefits to an illegitimate child than to a legitimate child.

Nowhere in the Longshoremen's Act is there any indication that a child could recover under it for the death of more than one father; but the decision below would allow these children to recover for the death of their mother's husband and also for the death of Harry Thomas who stood *in loco parentis* to them and was the actual father of at least three of them. It is Harry Thomas who is the actual beneficiary under the decision below in that it lessens his obligations to support the children.

We concede that in Louisiana a child born during marriage is presumed to be the child of the mother's husband. However, we submit that such an arbitrary presumption could not preclude the employer from showing the actual facts as "that would deny the truth and subvert the policy of the" Longshoremen's Act. Such a conclusive presumption would deny the employer the right to show the true facts under any cirmumstances, and make it liable to others than those specified by Congress.

Under the Louisiana statutes only the husband of the illegitimate children's mother could question their paterni-

ty, and the decedent never did take the required steps to that end, although the mother stated that they were not his children (R. 21) and that he threatened her if she should register their births in his name (R. 25). Nevertheless, the Court of Appeal held the employer liable to them under the Longshoremen's Act saying, "the paternity of the deceased husband of the mother of the children cannot now be attacked." (R. 35) 204 F. 2d at page 179.

This court said (citing many supporting cases) in *Prudence Realization Corporation v. Geist*, 316 U. S. 89, 95:

> "In the interpretation and application of federal statutes, federal not local law applies."

See also *Southern Railway v. Gray*, 241 U. S. 333, 338-9, where this court held similarly in an action under the Federal Employers' Liability Act.

CONCLUSION.

Recently, in *Sanderson vs. Sause Bros.*, 1953 AMC 1261, the District Court for Oregon held that the Oregon Employer's Liability Act could not be applied to an accident occurring on board a barge afloat in Oregon waters because the State law imposed a much higher standard of care than the maritime law, and would destroy the uniformity of the maritime law, and declared:

> "This is a much lower standard of care than is required under the Oregon Employers' Liability Act. Fromm vs. Lang, 131 Ore. 501, 505, 281 Pac. 120. In my view, the application of the Oregon Employers' Liability Act with the higher standards required by it in connection with the use of machinery and equipment would destroy the uniformity of the maritime law and is therefore not applicable to a situation in which a workman is killed on navigable waters within the territorial limits of Oregon."

Just as the standard of care set forth in the Oregon Act was held not to apply to a situation in which a workman was killed on navigable waters within that State, so also we maintain that the conclusive presumption of State law should not apply to a case involving death under the Longshoremen's Act, for the reason that such application will broaden the liability of employers in Louisiana and will "destroy the uniformity of the maritime law".

We respectfully submit that if the decision of the Court of Appeal is permitted to stand, a far different result would be written into the law than that intended by Congress.

In view of the far reaching effect of the question, we respectfully submit that this court should grant a writ of certiorari, and that the decision of the Court of Appeal be reversed.

Respectfully Submitted,

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CERTIFICATE.

This is to certify that copies of this petition have been served on counsel for respondent Sept. .... 1953.

.....
Attorney for Petitioner.

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HAROLD B. WILLEY, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

NO. 337

AVONDALE MARINE WAYS, INC.,

PETITIONER

VERSUS

SADIE ANTHONY WILSON, INDIVIDUALLY, SADIE ANTHONY WILSON, TUTRIX OF THE MINORS, GOVERNOR THOMAS, EDDIE JUNIUS THOMAS, VAINEY THOMAS AND ANNA ANTHONY

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OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PAGE BOUND VERTICAL IN BOOK

SUBJECT INDEX

	Page
CITATIONS	II
Statutes	II
Authorities	II
Table of Cases	II
OPPOSITION	1
Summary Statement	1
Statement of Facts Which Are Indisputable	2
Statutes Involved	4
The Question Presented	6
Reasons Why The Petition For Writ Of Certiorari Should Be Denied	6
Argument	7
A. Legitimacy Of The Children Involved Under The Longshoremen's And Harbor Workers' Act	7
B. Legitimacy of The Children Involved By Virtue of The State Laws	9
C. Legitimacy Of The Children By Virtue Of The Finding Of Fact By The Deputy Commissioner	12
D. Rebuttal Of Petitioner's Reasons Relied On For The Allowance of Writ Of Certiorari	15
E. Denial Of Petitioner's Specification Of Errors	16
Conclusion	21
CERTIFICATE	21

PAGE BOUND VERTICAL IN BOOK

CITATIONS

1. Statutes

44 Stat. 1424, 33 U. S. C. A. 901 et seq. 2,4,7,
Louisiana Civil Code of 1870, Article 184 4,9,11,12
Louisiana Civil Code of 1870, Article 185. 5,9
Louisiana Civil Code of 1870, Article 191 5,9
Louisiana Civil Code of 1870, Article 117 5,9
Louisiana Civil Code of 1870, Article 178 5,9
Louisiana Civil Code of 1870, Article 179 5,9,11,12
Louisiana Civil Code of 1870, Article 180. 5,9
Louisiana Civil Code of 1870, Article 188 5,9,13
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Keyway Stevedoring Co. vs. Clark, 43 F. 2d 983 9
Green vs. Crowell, 69 F. 2d 762 9
Helin vs. Marshall, 76 F. 2d 666 9
Turnbull vs. Cyr, 188 F. 2d 455 (1951) 9
Hutcheson Inv. Co. vs. Caldwell, 152 U.S. 65; 14 Sup. Ct. 504, 9
Great Northern R. R. Co. vs. Knapp, 240 U.S. 454;
36 Sup. Ct. 399 9
Blagg Vs. Black, 162 U.S. 439; 18 Sup. Ct. 853 9
Succession of Saley, 44 La. 433; 10 So. 873 9
State vs. Randall, 53 So. 2d 689 (1951) 10,11,14
State vs. Jones, 220 La. 381; 66 So. 2d 724 10,11
Feazel vs. Feazel, 62 So. 2d 118, 120, 121 10
Jenkins vs. Aetna Casualty Corp., 158 So. 217 (1935) 10,11
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Landry vs. Am. Creosote Works, 119 La. 231 11
Wright vs. Wright, 189 La. 539 11
Succession of Flynn, 161 La. 707 11,12,14
Patterson vs. Gaines et ux, 6 How. 550-588; 47 U.S. 573-618 . 12
Elci vs. Madera, 58 Am. Dec. 192 14
Succession of Bent, 179 La. 847; 152 So. 543 14
Succession of Huber, 28LA. ANN. 97 14
McNeely vs. McNeely, 17 So. 928 14
Crowelll vs. Benson, 283 U.S. 22 14
Abrecht-Lynch Corp. vs. Clark, 30 F. 2d 146 14

PAGE BOUND VERTICAL IN BOOK

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Naida vs. Russell Mining Co. 159 Pa. Super. 155;
48 A. 2d 16 14
Grifin's Case, 315 Mass. 71; 51 N.S. 2d 788 14
Pittsburg Plate Glass Co. vs. Morgesen,
193 Okla. 215; 177 P. 2d 115 14
C.E. Lytle Co. vs. Whipple Dep. Com., 156 F. 2d 155 14
Contractors, P.N.A.B. vs. Pillsbury, Dep. Com.
150 F. 2d. 310 14
South Chicago Coal & Dock Co. vs. Bennett, Dep. Com.
309 U.S. 251 18
Weyerhauser Timber Co. vs. Marshall, 102 F. 2d 78-81 16

PAGE BOUND VERTICAL IN BOOK

IN THE
SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1953

NO. 337

AVONDALE MARINE WAYS, INC.,

PETITIONER

VERSUS

SADIE ANTHONY WILSON, INDIVIDUALLY, SADIE ANTHONY WILSON, TUTRIX OF THE MINORS, GOVERNOR THOMAS, EDDIE JUNIUS THOMAS, VAINEY THOMAS AND ANNA ANTHONY,

RESPONDENTS

OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES:

Respondents pray that the petition for the Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, entered on May 1, 1953, in the case of Joseph H. Henderson, United States Deputy Commissioner, et al, Appellants, versus Avondale Marine Ways, Inc., Appellee, be denied.

SUMMARY STATEMENT

At the outset, respondents respectfully except to the use of the word "illegitimate" by petitioner in its petition when referring to the four minor children involved herein. By such unwarranted use of the word, petitioner not only assumes but concludes, as an established fact, that the children are illegitimate.

The legitimacy of these children were not only specifically recognized in the Judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, in proceedings entitled "Succession of Mose (Moses) Wilson, No. 312-342 of the Docket of that court, but also by the Judgment of the United States Court of Appeals for the Fifth Circuit which specifically recognized the

PAGE BOUND VERTICAL IN BOOK

the legitimacy of these children by virtue of the substantive laws of the State of Louisiana. This indiscriminate use of the word illegitimate is not only an unwarranted conclusion but defeats the very purpose of the State law made the basis of the lower court's decision (Ellis vs. Henderson, 204 F. 2d 173), namely, maintenance with finality and sanctity the legal status of the children, "innocent in any event and yet the chief sufferers, and the desire to avoid scandalous and degrading testimony".

Although admitting that its petition presents only questions of law (Page 7 of Petitioner's brief), petitioner constantly attempts to introduce sordid facts held inadmissible and not necessary for the determination of the questions of law involved. Petitioner has made the assumption of illegitimacy the predicate of all its arguments and although refusing to accept the local laws permanently fixing the legal status of these children, petitioner concludes that these children are illegitimate without offering any law or jurisprudence upon which it bases its determination of illegitimacy.

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STATEMENT OF FACTS WHICH ARE INDISPUTABLE

This case involves a claim for death benefits under the Longshoremen's and Harbor Workers' Compensation Act, March 4, 1927, 44 Stat. 1424, 33 U.S.C.A. 901, et seq.

Mose Wilson and Sadie Anthony were legally married by license and ceremony in the State of Louisiana and were citizens of that State. That at all times the said parties remained married without any legal separation from bed and board to sever their relations.

The four minor children involved in this case were born in the State of Louisiana, of the wife, Sadie Anthony, during the existence of this said marriage. At the death of Mose Wilson, the four minor children were recognized under the express laws of their State as the legitimate children of Mose Wilson and, accordingly, a judgment was rendered by the Civil District Court for the Parish of Orleans, State of Louisiana, in proceedings entitled "Succession of

Mose (Moses) Wilson," No. 312-342 of the Docket of that competent court declaring and recognising the four minor children involved herein as the LEGITIMATE CHILDREN of Mose Wilson.

A claim by these four minor children was duly filed for death benefits under the Longshoremen's and Harbor Workers' Act as the legitimate children of their deceased father, Mose Wilson. At a formal hearing before the Deputy Commissioner of the Seventh Compensation District, evidence was offered by the Avondale Marine Ways, Inc., Mose Wilson's employer, to attack the legitimacy of these four minor children.

A formal objection to the introduction of any evidence to attach the legitimacy of these children was made on behalf of the four minor children on the ground that under the express law of the State, and the Judgment of that State's court, which was offered and filed into evidence, the status of these children as LEGITIMATE was conclusively and forever settled, and that any evidence to the contrary was inadmissible and in derogation of the express laws of the State of Louisiana, the purpose of which was to safeguard the status of the four minor children. The Deputy Commissioner refusing to accept or follow the State law, overruled the objection and accepted evidence attacking the children's legitimacy and the paternity of the deceased. However, independent of the State Court, and the expresa laws of Louisiana, and the Judgment, the Commissioner, nevertheless, made a finding of FACT that the children were the legitimate children of the deceased, Mose Wilson, and found that the evidence was insufficient to establish as a fact, that the children were not the children of the said decedent.

The United States District Court for the Eastern District of Louisiana reviewed and reversed the finding of fact by the Deputy Commissioner. An appeal from this judgment to the United States Court of Appeal for the Fifth Circuit resulted in a judgment recognising the express laws of the State of Louisiana as controlling the legal status of the four minor children and recognising and re-affirming the four minor children as the LEGITIMATE CHILDREN of their deceased father, Mose Wilson. The decision of the United States Court of Appeals for the Fifth Circuit expressly recognized that "as to the minor children

PAGE BOUND VERTICAL IN BOOK

the evidence is without dispute that Sadie remained at all times accessible to her lawful husband".

The record shows and the Deputy Commissioner found that the mother of the four minor children in question continued to have sexual intercourse with her husband, Mose Wilson.

The Circuit Court of Appeals observed that that fact should not have been inquired into and that "in any event the paternity of the deceased husband of the mother of the children cannot now be attacked". The Court for the Fifth Circuit gave as its reasons for that conclusion those stated in Ellis vs. Henderson, a companion case decided the same day and which is reported in 204 F. 2d 173.

It should be observed that, unlike the companion case of Ellis vs. Henderson, 204 F. 2d 173, in the instant case the legitimacy of the children involved is established by the terms of the State statute as a MATTER OF LAW and by the express FINDINGS OF FACT by the Deputy Commissioner, irrespective of the State statute. From the Judgment of the United States Court of Appeal for the Fifth Circuit, the Avondale Marine Ways, Inc. has filed its petition in this Honorable Court requesting a Writ of Certiorari.

PAGE BOUND VERTICAL IN BOOK

STATUTES INVOLVED

The pertinent provision of the Longshoremen and Harbor Workers' Compensation Act, supra, Section 2 of the Act (33 U.S.C.A., Sec. 902, Par. 14) on definitions provides as follows:

> "(14) 'Child' shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in the relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. ----"

The Civil Code of Louisiana, Articles 184, 185, and 191, which provide as follows:

> Article 184 provides:
>
> "The law considers the husband of the mother as

the father of all children conceived during the marriage."

Article 185 provides:

"The husband can not by alleging his natural impotence, disown the child; he can not disown it even for cause of adultery, unless its birth has been concealed from him, in which case he will be permitted to prove that he is not its father."

Article 191 provides:

"In all the cases above enumerated, where the presumption of paternity ceases, the father, if he intends to dispute the legitimacy of the child, must do it within one month, if he be in the place where the child is born, or within two months after his return, if he be absent at that time, or within two months after the discovery of the fraud, if the birth of the child was concealed from him, or he shall be barred from making any objection to the legitimacy of such child."

The Civil Code of Louisiana, Articles 178, 179, and 180, which provide:

Article 178 provides:

"Children are either legitimate, illegitimate, or legitimated."

Article 179 provides:

"Legitimate children are those who are born during the marriage."

Article 180 provides:

"Illegitimate children are those who are born out of marriage." ------

The Civil Code of Louisiana, Article 188 provides:

"The legitimacy of the child born three hundred days after the separation from bed and board has been decreed, may be contested, unless it be proved that there had been cohabitation between the husband and wife since such decree, because it is always presumed that the parties have obeyed the sentence of separation.

But in case of voluntary separation, cohabitation is always presumed, unless the contrary be proved."

PAGE BOUND VERTICAL IN BOOK

THE QUESTION PRESENTED

Whether the State law, relative to the legitimacy of one of is children, is not controlling in determining the legal status of that child in a claim under the Longshoremen's and Harbor Workers' Act in the absence of any definition of "child" being contained in that congressional statute.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Since petitioner has made the basis of its petition and the predicate of its entire brief supporting same, a question of law, namely, the legitimacy of the four children involved, its petition for Writ of Certiorari must be denied for the following reasons:

1. The Longshoremen's and Harbor Workers' Act does not contain any definition defining child and Congress clearly contemplates that the State or local law should determine the legitimacy of a child.

2. Under the laws of the State of Louisiana, the children involved are undeniably recognized as the legitimate children of the deceased employee, Mose Wilson.

3. The four children involved were recognized by Judgment in the Succession of the deceased, Mose Wilson, in a competent court of the State of Louisiana, as being the legitimate heirs and children of Mose Wilson.

4. The Deputy Commissioner found, as a matter of fact, that the four children involved were legitimate and his finding of fact should not have been disturbed in view of the fact that, as observed by the United States Court of Appeals for the Fifth Circuit, the undisputed evidence was that the mother of the four children involved was always accessible to the deceased husband.

5. That under the circumstances of the case, as determined by the Federal law, State law, and even the general common law, the four children are the legitimate children of the deceased employee, Mose Wilson, in law and in fact.

6. There is no conflict between the State laws involved and the Longshoremen's and Harbor Workers' Act, nor any conflict in the decisions of the Courts of Appeals for the different circuits of the United States, nor any new questions of Federal law involved in this case.

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ARGUMENT

A. LEGITIMACY OF THE CHILDREN INVOLVED UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT

Longshoremen's and Harbor Workers' Act: Section 2 (14) on definitions provides as follows:

> (14) " 'CHILD' SHALL INCLUDE A POSTHUMOUS CHILD, A CHILD LEGALLY ADOPTED PRIOR TO THE INJURY OF THE EMPLOYEE, A CHILD IN RELATION TO WHOM THE DECEASED EMPLOYEE STOOD IN LOCO PARENTIS FOR AT LEAST ONE YEAR PRIOR TO THE TIME OF INJURY, AND A STEPCHILD OR ACKNOWLEDGED ILLEGITIMATE CHILD DEPENDENT UPON THE DECEASED, BUT DOES NOT INCLUDED MARRIED CHILDREN UNLESS WHOLLY DEPENDENT ON HIM."
>
> Section 9 (b) on Compensation for death provides as follows:
>
> "b) ------ and if there be a surviving child or children of the deceased, "

The word child is not defined in the Longshoremen's and Harbor Workers' Act and that statute fails to provide any express provisions for the method of determining the legitimacy of children.

Logically, therefore, the word "CHILD" must be interpreted in its ordinary, LEGAL SENSE, namely, the one RECOGNIZED BY LAW TO BE THE LEGITIMATE CHILD OF THE PARENT.

It is this law which must establish certain criteria and irrebuttable presumptions to protect PATERNITY and LEGITIMACY necessarily involved in the legal word "CHILD".

These facts were expressly recognized by the United States Court of Appeal for the Fifth Circuit in this case reported in 204 F. 2d 178, and also in the case of Ellis vs. Henderson, 204 F. 2d 173.

The Federal statute, likewise, does not include any provisions relative to the disavowal of paternity, or for establishment of legitimacy, or for the limitation of time in which such actions may be brought; nor does the statute designate the perons by whom such actions may be brought, or as to whom the burden of proof falls in such actions.

Certainly, there are no provisions in that statute which authorize collateral attacks on the legal status of children established by the laws of the State having control over their family status.

PAGE BOUND VERTICAL IN BOOK

Congress, in legislating the Longshoremen's and Harbor Workers' Act, a Federal workemn's compensation law, clearly intended to provide benefits to the injured employee and, in the event of death, benefits to those who were legally dependent upon him for support, namely, his family and also those whom he chose to make voluntarily a part of his legal family, such as adopted children, acknowledged illegitimate children and children in loco parentis. Thus, Congress contemplated providing support, in part, upon the employee's accidental death, to those whom he, the employee, normally would be obliged to support and to those whom he might be supporting by virtue of his own will or moral obligation.

Obviously, child need not be defined in the Federal Act since it means that child which is recognized by the state as a legitimate member of the employee's family and one whom he is obliged by that State law to support as such a member.

It is equally obvious that Congress was attempting to provide benefits for the employee and his dependents, and that Congress was attempting to place an obligation upon his employer in the event the employee suffered accidental death while in his employ.

The employer cannot claim any benefits under the section that is involved but merely has the obligation as a substitute for the deceased employee to pay in part those whom the employee was obliged by the State to pay as his legitimate child. The employer, assuming this obligation by his employment of the employee, certainly could have no greater rights than the employee himself, and since the employee's rights, as to his legitimate children, are all controlled by the State law, the employer accepted with full cognizance, the family as provided by the law controlling same, namely, the State.

It is a well settled principle of law that the absence of a definition in an act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the State law.

This is particular true to "subjects of the most intimate domestic character" such as who are "surviving widow, husband and children, and to the

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parents". Seaboard Airline Railroad Company vs. Kenney, 340 U.S. 492, 494; 36 Sup. Ct. 458, 60 L.Ed. 765, 766.

This decision was followed in Poff vs. Pennsylvania R.R. Co. (1946), 327 U.S. 390, wherein the Court said:

> "IT IS CLEAR THAT 'NEXT OF KIN' IS DETERMINED BY THE STATE LAW, STATE LAW GOVERNS WHETHER IT IS NECESARY TO DETERMINE IF ONE RELATIVE IS CLOSER THAN ANOTHER, OR IF A CLAIMANT FALLS WITHIN OR WITHIN THE CLASS."

Following the same line of reasoning, it has been held that State law controls as to whether one was a widow so as to be entitled to compensation under the present Act. Keyway Stevedoring Co. vs. Clark, 43 F. 2d 983, Green vs. Crowell, 69 F. 2d 762; Bolin vs. Marshall, 76 F. 2d 668; Turnbull vs. Cyr, 188 F. 2d 455 (1951). See also, Hutcheson Inv. Co. vs. Caldwell, 152 U.S. 65, 14 Sup. Ct. 504; Great Northern R.R. Co. vs. Knapp, 240 U.S. 454, 36 Sup. Ct. 399; Blagg vs. Black, 162 U.S. 439, 16 Sup. Ct. 853.

B. LEGITIMACY OF THE CHILDREN INVOLVED BY VIRTUE OF THE STATE LAWS

Revised Civil Code of the State of Louisiana is the controlling part of the State Law: Chapter 2--Of Legitimate Children, Section 1 -- Of Legitimacy Resulting from Marriage, Articles 184 - 192 of the Louisiana Revised Civil Code. Supra (Pages 4, 5 of this Brief).

See also Articles 178, 179. Supra (Page 5 of this Brief).

The Supreme Court of Louisiana, in the Succession of Saloy, 44 La. 433, 10 So. 872, crystallized the law of Louisiana regarding these codal articles as follows:

> "THERE IS NO DOUBT THAT A HUSBAND, ALTHOUGH HE BE PRESUMED BY LAW TO BE THE FATHER OF THE CHILDREN BORN FROM HIS WIFE, DURING THE EXISTENCE OF THEIR MARRIAGE, HAS THE INDISPUTABLE RIGHT TO REPUDIATE THEM WHEN THEY HAVE NOT BEEN BEGOTTEN BY HIM AND ARE THE SPURIOUS FRUITS OF THE ADULTEROUS INTERCOURSE OF HIS WIFE WITH ANOTHER MAN, BUT THE CASES IN WHICH HE IS PERMITTED TO GO INTO THE SCANDALOUS DOINGS OF HIS DEPRAVED CONSORT --

PAGE BOUND VERTICAL IN BOOK

> ARE SPECIFIED WITH PRECISION, AND HIS ACTION, AND IN HIS DEFAULT THAT OF HIS HEIRS, ARE TO BE ASSERTED WITHIN A LIMITED DELAY."
>
> "THE PROCEEDING MUST BE CONDUCTED CONTRADICTORILY WITH THE WIFE AND WITH THE CHILD OR CHILDREN -----"
>
> "THE LAW HAS MADE HIM THE SOLE JUDGE OF THE PROPRIETY OF ENGAGING IN SUCH A COURSE, WITH A RESERVE OF THE RIGHT TO HIS HEIRS OF DOING SO, IN THE EVENT OF HIS DEATH. HE IS THE ONLY ONE WHO PERHAPS CAN KNOW THAT HE IS NOT THE FATHER."
>
> "WHEN AWARE OF THE CIRCUMSTANCES UNDER WHICH HE MIGHT HAVE EXERCISED THE RIGHT OF REPUDIATION, THE HUSBAND, WHO IS THE SOVEREIGN ARBITER OF HIS HONOR, FAILS TO DO SO, THE DOOR IS FOREVER CLOSED AND NO ONE CAN AFTERWARD ASSERT A RIGHT STRICTLY PERSONAL TO HIM."

This doctrine was recently affirmed by the Supreme Court in the case of State vs. Randall, 53 So. (2) 689 (1951); State vs. Jones, (1951) 220 La. 381, 56 So.(2) 724.

The United States Court of Appeal for the Fifth Circuit, in the instant case, commented in its decision, based on reasons as reported in 204 F. 2d 178, that the pertinent Law of Louisiana which controls the legal status of children is simplified by a very recent opinion of the Supreme Court of Louisiana, Feazel vs. Feazel, 62 So. 2d 119, 120, 121.

<u>The very legal issue involved in the instant case has already been specifically passed upon by the courts of the State of Louisiana.</u>

> A DEFENDANT - EMPLOYER OR HIS COMPENSATION CARRIER CANNOT IN A SUIT FOR COMPENSATION UNDER THE LOUISIANA COMPENSATION STATUTE ATTACK THE LEGITIMACY OF A CHILD OF A DECEASED HUSBAND OF THE MOTHER OF THE CHILD DID NOT BRING AN ACTION TO DISAVOW SUCH CHILD WITHIN THE PERIOD OF TIME PRESCRIBED BY ARTICLE 184, 191 AND 192, OF THE LOUISIANA REVISED CIVIL CODE. Jenkins vs. Aetna Casualty, 158 So. 217 (1935); Harris vs. Aetna Casualty Corp. 127 So. 40 (1930); Farre vs. Celotex Co., 188 So. 904 (1942).

Under the Louisiana Statutes and the jurisprudence interpreting same, the following conclusions are undeniable:

1. The deceased Mose Wilson was legally obliged to support the four minor children involved herein.

PAGE BOUND VERTICAL IN BOOK

2. A suit could have been instituted at any time on behalf of the children as legal dependents to compel Mose Wilson to support them.

Landry vs. Am. Creosote Works, 119 La. 231; Wright vs. Wright, 189 La. 539; State vs. Randall, 53 So. 2d 689; State vs. Jones 220 La. 381; 56 So. 2d 724.

3. Harry Thomas, Savoy Harold or any other paramour, nor any other person claimed to be the father of these children could be obliged to support the four minor children involved herein.

4. The mother of these children involved could not require any other alleged father to support these children.

5. The State of Louisiana could not oblige any other person alleged to be the father of these children to support them except Mose Wilson, the deceased.

Succession of Flynn, 161 La. 707; State vs. Randall, supra; and State vs. Jones, supra.

6. The four children involved herein could not have been adopted by anyone without the consent of their father, Mose Wilson, the deceased employee.
La. Revised Statutes, Title 9, Section 427.

7. These minor children could not have been emancipated without the consent of their father, Mose Wilson, while he was living.
Civil Code of Louisiana, Article 366.

8. The four minor children involved herein could have sued the petitioner herein for the wrongful death of their father as a result of any tort chargeable to petitioner which might have occurred in any of the jurisdictions of the forty-eight states, and even under the maritime jurisdiction and Jones' Act, as Mose Wilson's legitimate children.
Civil Code of Louisiana, Article 184 (Supra, Page 4 and 5 of this Brief).

9. The four minor children involved herein could have sued the petitioner herein for workmen's compensation if the accident involved had occurred on the land in Louisiana and, undoubtedly, in the remaining forty-seven states.
Jenkins vs. Aetna Casualty Co., supra; Harris vs. Louisiana Oil Refining Co., supra; Farre vs. Celotex Co., supra (Page 10 of this Brief).

10. The four minor children could not have sued for workmen's compensation or in tort as a result of the death of any other alleged father since, under the Louisiana Law, they are the legitimate children of Mose Wilson and could not be the legitimate or illegitimate children of any other father.
Civil Code of Louisiana, Article 177, 178, 179 and 184 (Supra, Pages 4 and 5 of this Brief).

11. The four minor children could not be the acknowledged

PAGE BOUND VERTICAL IN BOOK

children of any one else because they were the litigitimate children of Mose Wilson and not illigitimate children.
Civil Code of Louisiana, Article 179 and 184 (Supra, Pages 4 and 5 of this Brief) and Succession of Flynn, (Supra, Page 11 of this Brief).

12. The mother of the minor children herein, Sadie Anthony, could not contest their legitimacy nor could birth certificates be used to show illegitimacy. Succession of Flynn, (Supra, Page 11 of this Brief).

C. LEGITIMACY OF THE CHILDREN BY VIRTUE OF THE FINDING OF FACT BY THE DEPUTY COMMISSIONER

At the formal hearing before the Deputy Commissioner, the evidence offered and relied upon by the Avondale Marine Ways, Inc., over objection, to contest the legitimacy of the minor children were the conflicting statements and admissions of their mother and the birth certificates of the said minor children.

The undisputed evidence, as observed by the Court of Appeals in the instant case, was that the evidence was without dispute that Sadie remained at all times where she was accessible to her husband. R. 34, and Joseph Henderson vs. Avondale Marine Ways, Inc., 204 F. (2d) 178.

On the basis, thus, of the undisputed facts and the evidence relied upon by the petitioner, the children would have been presumed to have been legitimate not only under the laws of Louisiana, but under the weight of authority of the general common law on the subject.

The Circuit Court of Appeals for the Fifth Circuit stated:

> "that a child born of a married woman during wedlock is presumed to be the child of her then husband is uniformily conceded",

and that under the early common law this presumption of law could only be rebu
butted by proof of facts showing it to be impossible that the husband could be the father. Patterson vs. Gaines, et ux, 6 How. 550-588; 47 U.S. 573-618.

Corpus Juris Secundum, Volume 10, Page 18-24:

> "The policy of the law is to confer legitimacy upon children born in wedlock when access of the husband at the time of conception was not impossible, and there is a presumption that a child so born is the

PAGE BOUND VERTICAL IN BOOK

> child of the husband and is legitimate, even though the wife was guilty of infidelity during the possible period of conception . -----
>
> ************
>
> Even under the modern rule, however, the presumption is a strong one, one of the strongest and most persuasive known to the law, which means that, in addition to performing its essential function as a rule of evidence, the presumption, like the presumption of innocence, is accompanied by another rule fixing the required measure of proof, and there is authority for the view that it is well-nigh conclusive, and that it becomes conclusive in absence of any sufficient proof that the husband could not have been the father, -----
>
> ************
>
> The presumption of legitimacy of children born during wedlock obtains, notwithstanding the husband and wife voluntarily separate and live apart, unless the contrary is shown, and this includes children born after the separation."

Thus, without the aid of the Louisiana Law establishing conclusively the legitimacy of the children, the Deputy Commissioner who saw and heard the witnesses and observed their demeanor, and knew all of the circumstances concerning all the alleged conflicting statements and admissions, nevertheless, made a definite FINDING OF FACT that the four children involved were the legitimate children of the deceased, Mose Wilson, and that the evidence was insufficient to establish as a fact that the four childrenf were not the children of the said deceased. (Pages 4 - 11 of Record).

It should be noted that the Deputy Commissioner also found as a fact that the deceased continued to cohabitate and have intercourse with his wife, the mother of the four children involved. (Pages 4 - 11 of Record).

Although the latter fact was found independently of the Louisiana Law, the Deputy Commissioner's finding on this fact was in accord with the general presumption of cohabitation where the marriage has not been dissolved. Corpus Juris Secundum Page 23, Volume 10. Also La. Civil Code Article 188 supra Page 5 of this Brief.

It is submitted that under the Louisiana Law, and in many instances of the common law, the admissions of the mother and birth registrations could not

PAGE BOUND VERTICAL IN BOOK

destroy the presumption of the legitimacy of the children under the above circumstances. Eloi vs. Madere, 58 Am. Dec. 192; Succession of Flynn, supra 161 La. 707, 109 So. 395; Succession of Bart, 179 La. 847, 152 So. 543, 91 A.L.R. 408, V Tulane Law Review, Pg. 449.

Birth Registrations cannot be used as evidence in a case of this nature, Succession of Huber, 20 La. Ann. 97 (1868); Succession of Flynn, supra; McNeely vs. McNeely, 17 So. 928 (1895); State vs. Randall, supra; Eloi vs. Madere, supra.

Consequently, although the facts should not have been inquired into, the Deputy Commissioner, nevertheless, did make a finding of fact that the four children involved herein were the legitimate children of the employee and his finding of fact should not have been disturbed. Crowell vs. Benson, 285 U.S. 22, Abrecht-Lynch Corp. vs. Clark, 30 Fed. 2d 144, and Joyce vs. U.S. Dep. Com., 33 Fed. 2d 218.

IT IS SOLELY WITHIN THE PROVINCE OF THE DEPUTY COMMISSIONER OF COMPENSATION ADMINISTRATOR TO DETERMINE THE CREDIBILITY OF WITNESSES, AND SUCH OFFICIAL MAY BELIEVE ALL OR ANY PART OF THE TESTIMONY ACCORDING TO HIS BOUND JUDGMENT OF ITS TRUTHFULNESS AND RELIABILITY.

Wilson & Co., Inc. vs. Locke, Dep. Com., 50 F. 2d 81 (C.A. 2, 1931); Naida vs. Russell Mining Co., 159 Pa. Super. 155, 48 A. 2d 16 (1946); Griffin's case, 315 Mass. 71, 51 N.S. 2d 768 (1944); Pittsburgh Plate Glass Co. vs. Morgeson, 198 Okla. 215, 177 P. 2d 115 (1947).

EVEN IF THE EVIDENCE PERMITS CONFLICTING INFERENCES, THE INFERENCE DRAWN BY THE DEPUTY COMMISSIONER IS NOT SUBJECT TO REVIEW AND WILL NOT BE REWEIGHED.

C. E. Lytle Co. vs. Whipple, Dep. Com., 156 F. 2d 155 (C.A. 9, 1946); Contractors, P.N.A.B. vs. Pillsbury, Dep. Com., supra; South Chicago Coal & Dock Co. vs. Bennett, Dep. Com., 309 U.S. 251 (1940).

PAGE BOUND VERTICAL IN BOOK

D. REBUTTAL OF PETITIONER'S REASONS RELIED ON FOR THE ALLOWANCE OF WRIT OF CERTIORARI

We respectfully submit the following answers in chronological form to the reasons relied upon by petitioner in its brief for the Writ of Certiorari (Page 8 through 11):

1. The decision below does not subordinate the Federal Act but, to the contrary, the Longshoremen's and Harbor Workers' Act validates the Louisiana Law relative to the legitimacy of one of its subjects where there is no conflict in the language of the State law with that of the Federal statute.

Moreover, the pertinent laws of the State of Louisiana does not not establish a conclusive presumption contrary to the truth and facts but merely establishes a reasonable time in the interest of public policy, in which the proper party may establish that fact.

2. The substantive laws of Louisiana relative to legitimacy cannot, in any way, be shown to be unconstitutional since, as aforestated, the State statute involved expressly provides due process of law and actually safeguards the rights of the individuals of an orderly society.

The employee had due process and was bound by his failure to disavow within the time prescribed. The employer has certainly no greater right than the employee in determining to whom the employee was obliged to support or treat as a member of the latter's family. The employer "stands in the shoes" of the employee insofar as the determination of the employee's legal dependents.

There are no property rights involved in this case except those of the minors, as well as their personal right to their name and their legal status. The employer has no property rights involved in paying the beneficiaries of the employee as designated and contemplated by the Federal Act.

Moreover, any objection made against a conclusive presumption as it might affect the property rights of one person will completely ignore the very purpose of a conclusive presumption, which is to effect the rights of all persons since generally conclusive presumptions are charged with public policy for the protection of citizens in general. It certainly cannot be denied that the Louisiana Law on legitimacy is completely charged with public policy dealing with the

PAGE BOUND VERTICAL IN BOOK

most fundamental element of public and society, namely, the family and who constitutes same.

While the Louisiana Statute may be referred to as conclusive presumption, it might be compared to an equitable estoppel which the courts have, in modern times, recognized as absolutely essential and necessary for the preservation of certain essential rights involving public policy. Corpus Juris, Vol. 21, Page 1059.

3. The Weyerhauser Timber Co. vs. Marshall, 102 F. 2d 78-81 case cited by petitioner is not applicable and the distinction between that case and the instant case is amply covered by the decision of the Court of Appeal for the Fifth Circuit in Ellis vs. Henderson, 204 F. 2d 173.

The Weyerhauser case illustrates that Congress intended not only to provide in the act for those children held by the states to be legitimate but also those which the employee chose to voluntarily make a member of his family.

4. Since the Louisiana laws relative to legitimacy are in no way in conflict with the Longshoremen's and Harbor Workers' Act but, to the contrary, by necessary implication are embodied in the application of the Federal Statute, it cannot be argued that the State law imposes any new liability not authorized by the Federal Act.

5. The children involved herein are legitimate as recognized by the lower court, consequently, petitioner's reference to illegitimates being given greater rights than legitimates is a non sequitur.

6. The question of referring to the State law in intimate domestic relations such as child, parent, is not a new question under Federal law since this matter has been previously settled by this Honorable Court, Seaboard Airline Railroad Co. vs. Kenney, supra (Page 9 of this Brief).

E. DENIAL OF PETITIONER'S SPECIFICATION OF ERRORS

Respondents deny that the Court of Appeal erred and respectfully submit answers to petitioner's specification of errors as follows, to-wit:

1. Rights and liability arising under a Federal Statute such as the

PAGE BOUND VERTICAL IN BOOK

Longshoremen's and Harbor Workers' Act herein, consonant with the State law, is an application of the Federal Statute.

2. The fundamental status in domestic relations has been recognized a matter for local law except where the law conflicts with the Federal legislation and, in the instant case, there is no such conflict.

3. Louisiana law does not make an acknowledged illegitimate child a child in the meaning of the law, since under the conditions of this case, the issue of illegitimacy is precluded if, for the purpose of argument, illegitimacy, as a fact, cannot be raised.

Under the Louisiana law, Civil Code Article 179, supra (Page 5 of this Brief) a child can only be legitimate or illegitimate.

4. The Louisiana substantive law on legitimacy of child is, as previously shown, not a conclusive presumption but, to the contrary, merely provides a limit to the time in which the father may deny the legitimacy of his child, and is not only a reasonable exercise of public policy, but it is necessary to afford society with finality and certainty as to the legal status of innocent children. Since these children are, for everyone, legitimate, any argument by petitioner of the extension of the law to illegitimates is a non sequitur.

5. Under the Louisiana law the employee does not make one a child his own by failing to disavow but it is possibly more adequate to say that within the condition implied or stated, he is precluded from denying parentage.

6. The ownership of property rights under a Federal statute consonant with State laws cannot be regarded as taking property without due process of law.

7. Petitioner's seventh speficiation obviously begs the whole question which is shown to have been determined inconsonance with most state and federal statutes.

And now further answering petitioner's brief, we respectfully submit that petitioner cites several cases in the brief submitted in request for the writ to sustain its argument supporting its contentions but that an analysis of the cases cited clearly show that they are not pertinent to the subject matter and the issues involved can be properly distinguished from the issue now be-

PAGE BOUND VERTICAL IN BOOK

fore this court.

The State statute involved in Robbins Dry Dock Co. vs. Dhal, cited by petitioner, did not concern an itimate domestic matter normally left to State determination by silence in the Federal act but, obviously, conflicted with the substantive maritime law. No such conflict exists in our instant case.

The cases of Schlessinger vs. Wisconsin, and Heiner vs. Donnan, cited by petitioner, are not analogous to the issue before this court. The decisions in those cases held that the states, in order to legislate for taxes, were obviously attempting, UNDER THE GUISE OF SUBSTANTIVE LAW, to enact a conclusive presumption which was objectionable, unreasonable and clearly unconstitutional.

In our case, the Louisiana statutes involved concern an intimate domestic matter and has been imposed for over a century, even before the existence of the Longshoremen's and Harbor Workers' Act, and cannot be said to have been created UNDER THE GUISE of substantive law, in an attempt to enact an unreasonable conclusive presumption. In the statutes held unconstitutional there was no opportunity given to rebut the conclusive presumption, whereas the Louisiana statute, to the contrary, permits the person, in interest, to prove the true facts but limits the time in which he may do so and, thus, are not actually conclusive presumptions.

The Louisiana statutes governing the most intimate domestic relations of its citizens, namely, the children and family, have been the basis of all Civil Law in Louisiana, and cannot be denied to be real substantive law. Not only are these laws reasonable but they are necessary to maintain an orderly society.

The domestic status of the individual is a matter of local law and contracts, such as employment of employees, made in contemplation of local application, necessarily contemplates local construction of local laws. Thus, the employee accepts the family of the employee as determined by the State law and has no property rights in the Federal statute in absence of any specific language, in connection with the determination of the employee's children.

It must be recognized that the legal status of a child should be determined conclusively as soon as possible so that the matter may be

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finally concluded for all persons having any rights or obligations in connection with that child.

It is unreasonable to suggest that Congress intended that a child could be legitimate in several instances and illegitimate in others.

Petitioner argues that to declare the children involved legitimate would permit them greater rights than an illegitimate child under the act since they might recover for two deaths, namely, for the death of the mother's husband, and the other for the death of the person standing in loco parentis to them. This argument is obviously of no avail since these children are legitimate and cannot claim any greater rights than any other legitimate child under the Federal statute.

If an legitimate child may recover as the child in loco parentis to some one else then, certainly, the four minor children are entitled to such rights as legitimate children. On the other hand, if legitimate children under the Federal statute are not entitled to claim any benefits as children in loco parentis to some one other than their father then, of course, neither can the four children involved.

It is to be noted, however, that a legitimate child, upon the death of his father or divorce of his mother from his father might very well become a child in loco parentis to some one else.

Petitioner contends that the act in specifying child means a lawful issue but does not suggest the manner in which a lawful issue should be determined or by what law. It is obvious that Congress cannot have intended that child in each case be proven biologically. This, naturally, would not only be undesirable, impractical but, in most cases, impossible. To suggest that this most important subject be left to the discretion of the individual Deputy Commissioners, without the aid of any laws thereon, must, of a certainty, manifest that only confusion and disunity in the interpretation of the act would follow.

Uniformity through the application of the existent local laws is secured but to follow petitioner's contentions to a logical conclusion would lead to complete disunity in the application of the act.

PAGE BOUND VERTICAL IN BOOK

It might well be argued if petitioner's contentions were accepted, that Congress would not have created benefits but actually, in many cases, a burden to the many children who might not dare, to claim as beneficiaries, the risk of possible slander and defamation by the allegation of indiscretion of their mother, true or otherwise.

How far can the line be drawn once the barrier is let down and the employer or its insurance carrier is permitted to question, challenge and even attack, collaterally, the conduct of an innocent child's parent?

The necessity and reasonableness of the State laws relative to legitimacy must be considered in the light of their public policy and cannot be weighed upon the facts of isolated cases, particularly when the facts are inadmissible.

We respectfully submit it is unreasonable to infer that Congress intended such serious result as the overthrow of Louisiana's public policy, without at least some expression or more definite language being contained in the statute.

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CONCLUSION

The judgment below is correct, and no conflict of decisions or question meriting further review by this Court is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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CERTIFICATE

This is to certify that copies of this Opposition and Brief have been served on counsel for petitioner October , 1953.

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